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6 UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
7 AT SEATTLE

8 DONALD R. HUNT,

9 Petitioner,

10 v.

11 JEFFREY A. UTTECHT,

12 Respondent.

CASE NO. C17-1827-RSM-BAT

**ORDER DENYING MOTION TO
TRANSFER OR TO DISMISS
AMENDED PETITION**

13 Petitioner Donald R. Hunt has filed an amended petition for writ of habeas corpus
14 challenging the computation of good time credits against his sentence. Dkt. 26. Before the court
15 is the respondent's motion to transfer the amended petition to the Ninth Circuit Court of Appeals
16 or to dismiss it for lack of jurisdiction. Dkt. 27. The court DENIES the motion and directs
17 respondent to file a response to the petition.¹

18 I. BACKGROUND

19 Petitioner is a Washington state prisoner who filed a petition for habeas corpus under 28
20 U.S.C. § 2241 in the Eastern District of Washington, where he is confined. Dkt. 1. That court
21 construed the petition as a petition for habeas corpus under 28 U.S.C. § 2254 and transferred the
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¹ In addition, respondent's previous motion to transfer or to dismiss the original petition (Dkt. 20) is DENIED as moot.

1 petition to this court, as petitioner is confined pursuant to a judgment and sentence of the
2 Snohomish County Superior Court. Dkt. 8. This court appointed the Federal Public Defender to
3 represent petitioner and directed service of the petition on the respondent. Dkt. 13. The
4 respondent moved to transfer the petition to the Ninth Circuit pursuant to 28 U.S.C. § 2244(b)
5 and Circuit Rule 22-3(a), or, in the alternative, to dismiss the petition, asserting that the petition
6 is a second or successive petition. Dkt. 20. In response, petitioner stated that one of his two
7 claims, concerning alleged violations of the Interstate Agreement on Detainers, should be
8 voluntarily dismissed because it can arguably be characterized as being cognizable under § 2254
9 and therefore subject to § 2244(b). Dkt. 22. He asserted that his remaining claim, concerning the
10 computation of credits for good time against his sentence, is properly governed under § 2241 and
11 therefore outside the purview of § 2244(b). *Id.* In light of this response, the court directed
12 petitioner to file an amended petition and respondent to file a response thereto. Dkt. 23.
13 Petitioner filed his amended petition. Dkt. 26. Respondent again seeks to have the petition
14 transferred or dismissed. Dkt. 27.

15 II. PETITION CONSTRUED AS § 2254 PETITION

16 As the court noted in addressing petitioner's objection to the transfer of his petition to
17 this district and to the finding that it should be construed as a § 2254 petition, Dkt. 23, the Ninth
18 Circuit has held that 28 U.S.C. § 2254 is the exclusive vehicle for a habeas petition by a state
19 prisoner in custody pursuant to a state court judgment, even when the petitioner is not
20 challenging his underlying state court conviction. *White v. Lambert*, 370 F.3d 1002, 1009-10 (9th
21 Cir. 2004). The court therefore construes the amended petition as a § 2254 petition.

22 The court asked the parties to address the issue of venue. Respondent states that because
23 petitioner is in custody pursuant to a judgment and sentence of the Snohomish County Superior

1 Court, this district is the proper venue for this proceeding. Dkt. 27 at 4. Petitioner states that as
2 he has been appointed counsel in this district and the court is familiar with his petition, he
3 believes that venue is most convenient in this district. Dkt. 26 at 3. Because the court construes
4 the petition as a § 2254 petition, venue is proper in this court.

5 III. SECOND OR SUCCESSIVE PETITION

6 Respondent argues in his motion to transfer or to dismiss that the amended petition is a
7 second or successive petition and, as such, this court should either dismiss the petition or transfer
8 it to the Ninth Circuit. Dkt. 27 at 6. Under 28 U.S.C. § 2244(b), a second or successive petition
9 must be dismissed unless it falls within one of two narrow exceptions. If a second or successive
10 petition presents claims that fall within an exception, § 2244(b) requires a petitioner to first move
11 in the court of appeals for an order authorizing the district court to consider the petition. If a
12 petitioner presents a second or successive petition to the court without such authorization, the
13 court will refer the petition to the court of appeals. Cir. R. 22-3(a).

14 Respondent argues that, as petitioner previously filed a habeas petition challenging his
15 conviction and sentence,² the amended petition currently before the court is a second or
16 successive petition and, under § 2244(b) and Rule 22-3(a), the court must either dismiss the
17 petition or transfer it to the Ninth Circuit. Dkt. 27 at 7-8. Respondent asserts that petitioner
18 “cannot evade the jurisdictional requirements of § 2244(b) simply by characterizing his current
19 petition as a § 2241 petition.” Dkt. 27 at 8.

20 Although it is true that this petition is the second one petitioner has filed, the inquiry does
21 not end there. As the Supreme Court has recognized, the phrase “second or successive petition”
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23 ² Petitioner’s habeas petition, filed with this court in 2014, was dismissed with prejudice as
untimely. *See Hunt v. Warner*, Case No. C14-1637-RSM, Dkt. No. 18 (April 8, 2015).

1 is a term of art. *Magwood v. Patterson*, 561 U.S. 320, 332 (2010). The term is not self-defining,
2 and it does not mean all § 2254 petitions filed second in time. *Panetti v. Quarterman*, 551 U.S.
3 930, 944 (2007). For example, a claim that was unripe at the time of the first petition is not
4 barred by the second or successive rule. *Id.* at 947. And a claim challenging a new judgment
5 entered after a successful first petition is not a second or successive petition. *Magwood*, 561 U.S.
6 at 331-32.

7 Here, petitioner is not challenging the underlying judgment and sentence he challenged in
8 his first petition. Rather, petitioner seeks to challenge the calculation of his good-time earned,
9 something entirely separate from the validity of the underlying judgment and sentence. The court
10 therefore finds that the petition is not a second or successive petition and therefore not subject to
11 § 2244(b) or Rule 22-3(a).

12 A claim that is not second or successive is reviewable by the district court. *Magwood*,
13 561 U.S. at 331. Accordingly, the petition is reviewable in this court. For this reason,
14 respondent's motion to dismiss or to transfer the petition (Dkt. 27) is DENIED.

15 IV. RESPONSE

16 The court hereby directs respondent to file and serve an answer in accordance with Rule
17 5 of the Rules Governing Section 2254 Cases in United States District Courts and with the
18 requirements set forth in this court's previous order directing service (Dkt. 13) no later than
19 **August 8, 2018.**

20 DATED this 9th day of July, 2018.

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23 BRIAN A. TSUCHIDA
Chief United States Magistrate Judge